

STATE OF MICHIGAN
COURT OF APPEALS

DONALD SMITH,

Plaintiff-Appellant,

v

CITY OF WARREN,

Defendant-Appellee.

UNPUBLISHED
February 23, 2006

No. 255004
Macomb Circuit Court
LC No. 2002-005544-NO

Before: White, P.J., and Jansen and Wilder, JJ.

WHITE, P.J. (*concurring in part and dissenting in part*).

I agree with the majority that the two inch rule applies to the instant case. The circuit court so held, and I would affirm that determination.

The majority concludes that plaintiff failed to offer evidence to rebut the inference that defendant maintained the sidewalk in reasonable repair, MCL 691.1402a(2). I do not agree with that determination, thus I respectfully dissent.

MCL 691.1402a(2) by its terms creates a rebuttable inference, not a conclusive presumption. While plaintiff was required to present more than a mere allegation that the sidewalk was not in reasonable repair, defendant's employee's deposition testimony that the water shutoff valve should have been flush to the ground and should have had a blue cover, Feyers' testimony (discussed *infra*) that the valve had been the way it was when plaintiff fell for "years," as well as the photographs submitted below showing the protruding water valve, were sufficient to create a genuine issue of fact whether plaintiff rebutted the inference of reasonable repair.

Regarding the remaining issues, the circuit court concluded that plaintiff's claim was barred under MCL 691.1403 for failure to establish that defendant had actual or constructive notice of the defect. The circuit court also concluded that although plaintiff failed to give notice within 120 days as required under MCL 691.1404(1), defendant did not demonstrate actual prejudice by the delay, and the court denied summary disposition to defendant on that basis.

I agree with the circuit court that defendant did not demonstrate actual prejudice from plaintiff's belated notice¹, MCL 691.1401(1), and would affirm that determination.² Unlike the circuit court, however, I conclude that plaintiff established a genuine issue of material fact regarding whether defendant had notice under MCL 691.1403, because the defect had existed for far more than 30 days. Plaintiff submitted documentary evidence below including the deposition testimony of Rachel Feyers, the friend whom plaintiff was going to visit at the time of his fall. Feyers lived next door to the Neimans, in front of whose property the sidewalk that had the protruding water valve box was situated. Feyers testified that the water shut off valve had looked the way it did when plaintiff fell for "years."

Defendant relies on the Neimans' deposition testimony that they had lived in their home for 26 years, and that neither they, their children, nor the mail or newspaper carrier had ever had a problem with the water valve box and had never tripped over it. Defendant asserts that it is obvious from the Neimans' testimony that they did not consider the alleged condition a hazard and that the alleged defect was thus not readily apparent and therefore, that "it surely cannot be held that the City could have had prior notice." Regarding Feyers' testimony that the condition had existed for years, defendant asserts that Feyers "never found the defect to be one of such a nature that required notification to the City or her neighbors for repair." Defendant contends that there was nothing in the record to establish notice regarding the missing cap/cover and that reasonable minds could not differ that the City could not have had actual or constructive notice.

I conclude that there was a question of fact regarding notice under the statute. The testimony in the record is that the protruding water valve box had had a blue cover at one time. The Neimans could not recall how long the cover had been missing. Feyers' testimony allows one inference only—that the water valve had not had a cover for years. Documentation plaintiff submitted below, both deposition testimony of several City workers, and City maintenance records, indicate that the water valve box was repaired by being made flush to the ground, and by having a new cover placed on it. The photographs submitted below show a protruding water valve box without a cover. From this evidence, a reasonable jury could conclude that the alleged defect had been readily apparent to an ordinarily observant person for a period of thirty days or longer before the injury took place. I would conclude that the circuit court erred in finding that plaintiff's claim was barred under MCL 691.1403.

I would reverse and remand for further proceedings.

/s/ Helene N. White

¹ Defendant has not cross-appealed this ruling in plaintiff's favor.

² The record establishes that defendant corrected the defect on June 14, 2002, less than 60 days into the 120-notice period.